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The Politics and Law of Trade Union Recognition: Democracy, Human Rights and Pragmatism in the New Zealand and British Context

Alan Bogg and Tonia Novitz, University of Bristol UK

alan.bogg@bristol.ac.uk; tonia.novitz@bristol.ac.uk

Abstract

In this article, we seek to examine the potential for cross-fertilization of legal regimes relating to trade union representation of members in collective bargaining. The United Kingdom has moved from an entirely voluntarist model in the 1980s to a statutory regime which facilitates recognition of a trade union following majority support from workers (usually by a ballot). By way of contrast, New Zealand has shifted from a highly regulated award-based model in the 1980s to an “agency” model whereby an employer is required to bargain in good faith with any union representing two or more of the employer’s employees, but with some balloting also contemplated for coverage of non-unionised workers. It is uncontroversial that the UK legislation has been severely limited in its effects in a context of ongoing decline in collective bargaining, while the NZ model offers only faint remediation of the dismembering of the collective bargaining system by the Employment Contracts Act 1991. In both legal systems, a Labour Party is now proposing implementation of forms of sectoral bargaining. We explore the reasons for these political and legal developments, exploring democratic and human rights rationales for their adoption, as well as more pragmatic approaches. In so doing we examine the scope for democratic trade union representation via consent or ballot, the role of individual human rights, and regulatory rationales. We conclude by considering how representative and regulatory approaches may be mutually reinforcing and addressing different understandings of “constitutionalisation”. In so doing, we reaffirm the emphasis placed in Gordon Anderson’s writings on substance over form.

1. Introduction

In this article, we consider the potential for cross-fertilization of legal regimes relating to trade union representation of members in collective bargaining. The United Kingdom¹ has moved from an almost entirely voluntarist model in the 1980s to a more hybrid statutory-voluntary regime. The legislation facilitates recognition of a trade union following majority support from workers (usually by a ballot), but statutory recognition is not envisaged as a supersession of voluntary bargaining arrangements where the parties reach agreement. By way of contrast, New Zealand shifted from a highly regulated award-based model to an

¹ The United Kingdom consists of Great Britain and Northern Ireland. We use the term ‘British’ colloquially to refer to this full constituency.

“agency” model whereby an employer is required to bargain in good faith with any union representing two or more of the employer’s employees. It was the latter feature, analogous to common law contractual principles and the law of agency, which Gordon Anderson identified in his extensive writing on this subject.²

It is uncontroversial that British legislation has been severely limited in its effects in a context of ongoing decline of collective bargaining coverage, while the New Zealand model offers only faint remediation of the dismembering of the collective bargaining system by the Employment Contracts Act 1991. We examine the reasons for these political and legal developments, considering democratic and human rights rationales for their adoption. Curiously, New Zealand offers a more direct protection of the “right to be represented” often recognised as intrinsic to freedom of association, despite the absence of a juridified “constitutionalisation” framework.

We then explore whether the operationalisation of this “agency” approach could supplement the majoritarian system adopted in the United Kingdom (also Australian and North American) bargaining regimes in ways that are more conducive to an inclusive ‘bottom up’ workplace democracy based upon strong worker mobilisation. This has the potential to provide legal support for “industrial strength”, which Gordon Anderson and Pam Nuttall have considered necessary for effective trade union representation as a basis for “voice” at work.³ We also address the regulatory challenges posed by the recent turn towards “sectoral” bargaining strategies, as outlined in the recent British Labour Party Manifesto proposals⁴ and New Zealand proposals for “Fair Pay Agreements”.⁵ We end by reflecting upon how

² Gordon Anderson, “Good Faith in the Individual Employment Relationship in New Zealand” (2011) 32 Comp Lab L & Pol’y J 685; see also Gordon Anderson, *Reconstructing New Zealand’s Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011).

³ Gordon Anderson and Pam Nuttall, “The Good-Faith Obligation: An Effective Model for Promoting Voice?” in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP, Oxford, 2014).

⁴ *For the Many, Not the Few* (Labour Party, London, 2017) available at: <https://labour.org.uk/manifesto/>. See at 47 and at 51, which say that Labour will “roll out sectoral collective bargaining”.

⁵ See New Zealand Labour’s 2017 Election Platform available at: <https://www.labour.org.nz/workplacelrelations>. This states that Labour will be: “Introducing Fair Pay Agreements that set fair, basic employment conditions across an industry based on the employment standards that apply in that industry.”

representational and regulatory enterprise-based and sector-based bargaining might be coordinated in an integrated system of multi-level governance in New Zealand and the United Kingdom, alongside how different understandings of “constitutionalisation” can be effective.

2. “Representational” and “regulatory” bargaining through trade unions: individual right, democratic entitlement, or public governance?

Keith Ewing and John Hendy have drawn attention to an important distinction between two different conceptions of collective bargaining.⁶ “Representational” bargaining is usually predicated upon the representation of workers’ interests through collective bargaining at the level of the enterprise. This form of bargaining is circumscribed in two main respects: first, bargaining outcomes are typically confined to the enterprise; and second, the trade union’s representation function is tied very closely to the authorizing consent of the represented workers. This decentralized “representational” model has (at various times) been characteristic of the United Kingdom, United States, Canadian and New Zealand models of collective bargaining. There are of course many important legal differences between each of these jurisdictions. There is however an underlying basic normative unity, which is to frame collective bargaining as a private market activity conducted by trade unions on an enterprise basis as designated agents of a tightly circumscribed bargaining unit. In turn, this “representational” conception is closely aligned with a consent-based model of representational legitimacy.

By contrast, a “regulatory” conception of collective bargaining conceives of it as a public regulatory activity conducted at sectoral or national levels. On this view, collective bargaining is a mode of public governance akin to law-making. It involves trade unions in the public governance of employment for larger-scale geographical or sectoral constituencies. This may even extend to national-level social pacts. This regulatory species of collective bargaining is characteristic of European industrial relations systems such as those of France or Germany. Historically, the British and New Zealand industrial relations systems were also aligned with such a regulatory conception. For example, British bargaining institutions were supported by a range of indirect auxiliary props: machinery for ensuring the compulsory

⁶ See Keith D Ewing, “The Function of Trade Unions” (2005) 34 *Industrial Law Journal* (ILJ) 1; and Keith Ewing and John Hendy, “New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining” (2017) 46 *ILJ* 23.

normative effect of qualifying collective agreements, wages councils, fair wages clauses, extension of collective agreements and compulsory arbitration.⁷

Comparative reflection on the recent trajectories of British and New Zealand law and practice provides some interesting perspectives on this distinction. Currently, the legal structures in New Zealand and the United Kingdom represent variations on these models. The NZ “agency” model is the purest form of a consent-based model of representational legitimacy, in that the trade union acts as a designated bargaining representative exclusively for its members. There are difficulties entailed in extending its normative effects to workers who have not given the union authorisation to act as their agent. By contrast, the British statutory “democratic entitlement” model makes provision for a democratic procedure based upon “majority rule”. Where the trade union representative achieves majority support in the bargaining unit, either through membership density or through a statutory ballot, it is authorised to bargain on behalf of all the workers in the bargaining unit. As we shall see, each of these legal models of “representational” bargaining has significant weaknesses. Having identified those weaknesses, we assess whether a hybrid model of “agency” and “democratic entitlement” might provide a more effective legal structure for representational bargaining at enterprise-level.

We then consider the role of sectoral bargaining as “public governance”, which requires a different approach to representational legitimacy and regulatory effectiveness. Union membership density might be one relevant factor to consider in determining whether a trade union is representative. However, a rich variety of representational principles have been deployed alongside union membership density in European industrial relations systems. As Bruno Veneziani has observed, “there is no golden formula for representativeness, valid for all situations and all functions, on the European scene”.⁸ These criteria have often evolved organically over long periods of time and in accordance with the internal logics of specific

⁷ Alan Bogg and Tonia Novitz, “Recognition in Respect of Bargaining in the United Kingdom: Collective Autonomy and Political Neutrality in Context” in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, New York/London, 2012) at 227; drawing on Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, Oxford, 2009).

⁸ Bruno Veneziani, “The Intervention of the Law to Regulate Collective Bargaining and Trade Union Representation Rights in European countries: Recent trends and problems” (1999) 5 *Transfer: European Review of Labour and Research* 100 at 128.

industrial relations systems. Factors that have been treated as relevant principles have included (in addition to union membership density): organizational connections to authoritative national confederations; alignment between the subject matter of negotiation and the trade union's particular functions; and sufficient internal structures to facilitate democratic participation of union members.⁹

An individual right to representation

It has been powerfully argued by Hendy that the right to be represented by a trade union is a fundamental human right.¹⁰ He sees this as a right to be accompanied to workplace grievances, to be informed and consulted, but also to have access to collective bargaining by this means. It is well-established that there is an internationally recognised right to associate and to be a trade union member. Article 22, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) 1966 states simply: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 further reiterates that the States Parties undertake to ensure "the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests" (at paragraph 1). These are notably rights that apply to "everyone" and do not seem to be dependent on national or transnational norms concerning "worker" or "employment" status.¹¹ The link between the entitlement to trade union membership and the promotion and protection of one's interests is significant for the purpose of trade union recognition which enables effective collective representation. It seems to be enough that a worker has joined the trade union for her to be represented by it in matters of economic and social concern. Further, given the remainder of the text of Article 8 of the ICESCR, it is evident that trade unions are to act freely for these purposes, subject only to certain listed restrictions including, notably, "limitations ... prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the

⁹ *Ibid.*, 126 - 130.

¹⁰ John Hendy QC, *Every Worker Shall Have The Right To Be Represented At Work By A Trade Union* (Institute of Employment Rights, Liverpool, 1998).

¹¹ See Valerio De Stefano, "Non-standard Work and Limits on Freedom of Association: A human rights-based approach" (2016) 46 ILJ 185.

protection of the rights and freedoms of others”. Indeed, in many respects this text mirrors that of Article 11 of the European Convention on Human Rights (ECHR), which is binding on the United Kingdom as a ratifying signatory, having scope for domestic implementation by virtue of the Human Rights Act 1998.

A familiar dimension of the “constitutionalisation” of labour law is the capacity to view the rights of workers as human rights to be protected through human rights mechanisms internationally, regionally and domestically.¹² The “agency” model of members-only or explicit consent for bargaining would seem to correspond with this human rights-based model. The right-holder is the individual trade union member. The collective dimension of the right occurs whenever a group of trade union members decide to exercise their individual right collectively together. Given that the human rights entitlement is vested in the individual, it follows that this entitlement cannot be extinguished where a trade union fails to achieve majority support in the bargaining unit. This would be a significant advantage in a system based exclusively on majority bargaining agents, where the failure to achieve majority support means that the possibilities for collective representation are effectively extinguished.

Despite its advantages, there are three main difficulties with this model. First, it does not necessarily allow for the possibility that the trade union itself, as a distinct entity, might enjoy a group right to collective bargaining that is separate from the aggregate of individual members’ rights. This notion of a collective right to bargain has now been recognised under various constitutional instruments.¹³

Second, this model does not provide a clear account of which correlative duties, if any, correspond to the right to representation. The most minimal account might conceive of this as simply a freedom to negotiate through a bargaining agent. In which case, it might follow that since this is simply a freedom, not a right, there are no correlative duties on employers. Of course, Hendy’s argument identifies the basic entitlement as a *right* to representation. This transcends the limitations of a simple agency model and might connect to the bargaining “in good faith”, which Anderson identified as vital to any success of the New Zealand system of

¹² As discussed by Judy Fudge, “Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes” (2015) 68(1) Current Legal Problems 267.

¹³ See for example the South African Constitution 1996, Article 23(4) and (5).

industrial relations.¹⁴ It still leaves unresolved however whether correlative duties escalate where these individual rights are exercised collectively, for example allowing for the scope to extend collective bargaining coverage to a minority of non-trade union members.

Finally, in many human rights instruments there is an important principle of effective legal protection that shapes the implementation of human rights guarantees. For example, under the ECHR the Court has stated that “the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.¹⁵ In a system of members-only bargaining, where bargaining arrangements are so fragmented as to provide a weak system of worker representation, this may constitute a failure to ensure that worker representation arrangements “are practical and effective”.

It is notable that these provisions in the 1966 Covenants are expressly linked to ILO Convention No. 87, which is to take precedence in terms of State obligations.¹⁶ The difficulty, perhaps, with the latter ILO Convention is that trade union recognition falls somewhere between Article 2, which again sets out the bare entitlement of workers to form and join trade unions and Article 3 which enables workers to ‘organise their administration and activities and to formulate their programmes’. In this sense, ILO Convention No. 98 offers a vital supplement to these modest statements of basic human rights to place an obligation on States to promote collective bargaining. Here Article 4 is vital, which states that: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”¹⁷ At this point, we have arguably moved beyond the individual entitlement model. Where there is State responsibility to ensure that collective bargaining is promoted, this requires that members-only arrangements be supplemented by other forms of positive legal support for trade union representation.

¹⁴ As discussed in Anderson and Nuttall, n.3 above.

¹⁵ *Artico v Italy* (1981) 3 EHRR 1, para 33.

¹⁶ See ICCPR, Art.22(3) and ICESCR, Art. 8(3).

¹⁷ Indeed, it would seem to be from Convention No. 98 that Article 23(4) and (5) of the South African Constitution are derived.

A democratic claim to representation

In arguing for a democratic right to representation, one is seeking to overcome the objection that, while a person has a human right to join a trade union, the ability of that union to request that an employer engages in collective bargaining is subject to limitations. In particular, the worker's right can be viewed as being limited by (*inter alia*) the rights and freedoms of the employer, the latter being 'necessary in a democratic society' (as set out in Article 8 of the ICESCR and Article 11(2) of the ECHR). In this context, employers have sought to argue that they have the right *not* to be a trade union member and a right *not* to engage in collective bargaining.¹⁸ The counter-argument is that where the workers' desire to be so represented is itself collectively determined and democratic in nature it offers a powerful reason for state-supported "recognition". In both an Australian and British context, legislative intervention has given weight to this understanding of recognition as a democratic claim. However, concerns remain as to their operation: from the ways in which numbers are tallied (is this genuine "democracy"?),¹⁹ to the scope of obligations (after recognition) to bargain in good faith.²⁰

The legislative scheme in the UK reflects the general structure and normative orientation of the US Wagner Act model.²¹ It empowers a specialist agency, the Central Arbitration Committee (CAC), to determine the bargaining unit and measure worker support within that bargaining unit. The CAC must impose (absent a voluntarily agreed method) a legally

¹⁸ For example, *Young, James and Webster v UK* (1982) 4 EHRR 38; and *Gustafsson v. Sweden* (1996) 22 EHRR 409. See Tonia Novitz, "Negative Freedom of Association" (1997) 26 ILJ 79; see also Virginia Mantouvalou, "Is there a Human Right Not to Be a Trade Union Member?" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work – Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010). For a more recent illustration, see *Janus v American Federation of State County, and Municipal Employees, Council 31 et al* United States Supreme Court judgment delivered 27 June 2018, available at: https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf. The majority judgment effectively abolishes "agency fees" paid by non-members for union-led improvement in their terms and conditions, which was fixed at approximately 78% of full union dues, overturning a forty year precedent. See the dissenting judgment of Justice Kagan, with whom Justice Ginsberg and Justice Sotomayer joined.

¹⁹ Bogg n.7 above, at ch 5 and 7.

²⁰ Anthony Forsyth and Sara Slinn, "Promoting Worker Voice through Good Faith Bargaining Laws: The Canadian and Australian Experience" in Bogg and Novitz (eds) n.3 above. Cf. Anderson n.2 above.

²¹ See the Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1.

binding bargaining procedure agreement upon the parties in a situation of majority worker support for the union's recognition claim. This mechanism is based upon a conception of representational legitimacy that collective bargaining rights are legitimated through the collective majoritarian consent of workers. In simple terms, workers get collective bargaining only if this is what workers want, and the state remains neutral as to those preferences. Collective consent is determined by a process of preference aggregation. This usually occurs through a formal ballot, although it is still possible in the UK for majority support to be confirmed through trade union membership levels in the bargaining unit. Where the union achieves majority support, "democratic" models of union recognition generally confer exclusive representative status on that union in respect of the bargaining unit.

In the UK, at least, human rights jurisprudence under Article 11 of the ECHR has provided some modest support to the statutory recognition model. In *Wilson v UK*, the European Court of Human Rights (ECtHR) held that UK law had violated Article 11 because "it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation".²² As such, the UK government was under an obligation to introduce measures to protect trade unionists from the use of financial inducements which interfered with the Article 11 rights of individual workers and the trade union itself. Such intervention would provide an important prop to the bargaining activities of an exclusive bargaining agent, by supporting the "normative effect" of collectively agreed norms in the bargaining unit.

Wilson v UK was an important staging-post in the evolution of a progressive Article 11 jurisprudence. At this stage, the court stopped short of recognizing a right to collective bargaining as an essential element of Article 11.²³ In the landmark decision in *Demir and Baykara v Turkey*,²⁴ the Court finally recognized the right to collective bargaining as a fundamental element of Article 11. In the course of so doing, the Court observed that this recognition was in the context of "it being understood that States remain free to organise their

²² *Wilson and the NUJ v UK* (2002) 35 EHRR 20, para 47.

²³ *Ibid.*, para. 44.

²⁴ *Demir and Baykara v Turkey* App 34503/97, 12 November 2008. See Keith Ewing and John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010) 39 ILJ 2.

system so as, if appropriate, to grant special status to representative trade unions”.²⁵ This opened up permissive space under Article 11 for a statutory system that conferred preferential bargaining rights, correlative to bargaining duties, on majoritarian bargaining representatives, so as to comply with obligations under ILO Convention No. 98.

Public governance

As we have seen, proposals for sectoral arrangements now form part of a progressive agenda for collective bargaining reforms in New Zealand and the United Kingdom. It is worthwhile to reflect upon the position of such arrangements from the perspective of human rights jurisprudence. As Ewing and Hendy have pointed out in their recent reflections on sectoral collective bargaining, sectoral arrangements were effectively blocked in the US because of constitutional objections.²⁶ This was because the achievement of binding normative effect for sectoral codes, secured through a Presidential order, gave these codes the status of law. This was constitutionally objectionable because law-making authority had been allocated to Congress under the US constitution. Ewing and Hendy also point to recent jurisprudence in Ireland where similar constitutional objections were levelled against sectoral arrangements.²⁷ This is an important reminder that human rights, understood as legal entitlements in the hands of courts, can sometimes obstruct the realization of progressive political agendas.

Given the prevalence of sectoral bargaining in Europe, Article 11 is unlikely to be interpreted by the ECtHR so as to undermine sectoral arrangements. There is not a single constitutionalised template for the right to collective bargaining. Rather, the right will take shape in a variety of ways across different constitutional orders. Nevertheless, we think that there are three potential difficulties in reconciling a constitutionalised right to collective bargaining with sectoral arrangements.

First, Article 11 has operated as a weak constraint on the deregulation of sectoral arrangements in the UK. In *Unite v United Kingdom*,²⁸ the ECtHR considered that the abolition of the Agricultural Wages Board did not constitute an interference with the right to

²⁵ *Demir and Baykara v Turkey* App 34503/97, 12 November 2008, para 154.

²⁶ Ewing and Hendy n.6 above, at 32.

²⁷ *Ibid.*, at 32.

²⁸ *Unite the Union v United Kingdom* App No 65397/13, 3 May 2016.

collective bargaining under Article 11. Accordingly, the application was rejected as manifestly ill-founded. The abolition of the sectoral scheme was within the state's margin of appreciation. The ECtHR regarded it as significant that other mechanisms for securing recognition existed, such as industrial action or the statutory recognition procedure. Given that in agriculture the vast majority of employers fail to meet the stipulated threshold of employing at least 21 workers, the statutory recognition procedure is in practice unavailable within the agricultural sector. In addition, the dispersed and often precarious nature of employment in the sector rendered it highly unlikely that groups of co-workers would be able to secure recognition through a credible threat of strike action. Indeed, it is these very reasons that provided the rationale for a protective sectoral regime.

Second, in order for sectoral institutions to operate effectively, it is necessary that trade unions can organize strike action on a sectoral basis. This would require some latitude for trade unions to organize "secondary" industrial action. In UK law, the statutory immunity for strike action is withdrawn in circumstances of "secondary" action. This leaves the trade union exposed to liability in tort, and it exposes individual strikers to a greater risk of lawful dismissal for participating in strike action. The ban on secondary action was challenged in *RMT v United Kingdom*.²⁹ The ECtHR rejected the application as inadmissible, on the basis that the domestic ban was justified under Article 11 and within the state's margin of appreciation.

Both decisions demonstrate that Article 11 may be impotent in the face of legislative action hostile to sectoral arrangements. The third possibility is that constitutional freedom of association norms might themselves be presented as a constitutional barrier to sectoral arrangements. We have already seen this phenomenon in the US and Irish contexts. In the recent Canadian case of *Mounted Police Association of Toronto v Canada*,³⁰ the Supreme Court of Canada concluded that a statutorily imposed non-independent representative body constituted a "substantial interference" with employees' freedom of association. In its reasoning, the SCC referred to the significance of "choice" in assessing the constitutional propriety of labour relations arrangements, namely "the ability to have effective input into the

²⁹ *The National Union of Rail, Maritime and Transport Workers (RMT) v the UK* App 31045/10, 8 April 2014; see also Alan Bogg and Keith Ewing, "The Implications of the RMT Case" (2014) 43 ILJ 221.

³⁰ *Mounted Police Association of Ontario v. Canada (Attorney General)* [2015] 1 SCR 3.

selection of collective goals to be advanced by their association”.³¹ It is important to emphasise that this decision was crafted within the specific context of the Canadian constitution. Nevertheless, the constitutionalisation of “choice” as a normative principle seems to be aligned with a “democratic mandate” model of union recognition and even collective action.³² Since representational legitimacy extends beyond “choice” in sectoral arrangements, such a principle could create constitutional difficulties for sectoral collective bargaining.

3. Separate histories: some starting points for comparison

Our experience of the “Voices at Work” project, on which we were engaged with Gordon Anderson as one of our research partners, has made us wary of crude comparisons between different national industrial relations systems.³³ We do not pretend that trade union recognition has ever meant the same in the British and New Zealand systems. Rather, both can be understood as shaped by their respective histories.

The British trade union recognition system operates against the background of “collective laissez-faire” bargaining and unsuccessful experimentation with forms of State intervention in the 1970s. Whereas, the New Zealand system is deeply rooted in extensive State intervention in the apparatus for collective bargaining, a thirty year rejection of that model which has proved unsuccessful and a new determination to experiment with combinations of past approaches which benefit working people.

From collective laissez-faire to “democratic” trade union recognition in the United Kingdom

The UK has, in industrial relations terms, followed its own distinctive trajectory towards recognition of organised labour and scope for collective bargaining. Historically, the UK

³¹ *Ibid.*, para 86.

³² See for comparison of the “democratic” rationales for UK rules on majority voting for statutory trade union recognition and the ability to take industrial action in “important public services” (namely approval by 40% of those eligible to vote), see Tonia Novitz, “UK Regulation of Strike Ballots and Notices – Moving Beyond ‘Democracy’?” (2016) 29 *Australian Journal of Labour Law* 226.

³³ See for an overview of the project (2011 – 2014), Alan Bogg and Tonia Novitz “Purposes and Techniques of Voice: Prospects for Continuity and Change” in Bogg and Novitz n.3 above, especially at 5.

system was based upon the theory and practice of “collective laissez-faire”. This eschewed a reliance on “direct” methods of legal enforcement, such as a legal duty to bargain. Instead, collective bargaining was promoted through a variety of “indirect” (or auxiliary) methods such as institution-building through administrative law, fair wages resolutions and public contract compliance, extension mechanisms for collective agreements, compulsory arbitration, and sectoral wages councils.³⁴

The first legislative experiment in “direct” trade union recognition was implemented in the ill-fated Industrial Relations Act 1971. This legislation offered trade unions certain new forms of statutory protection and promotion of their interests, but in exchange for registration, which entailed a highly juridified restriction of their freedom to undertake strike action. The recognition procedure was short-lived. The entire legislative framework was rendered unworkable by a concerted campaign of non-registration by most British trade unions. The second legislative experiment in statutory recognition was implemented in the Employment Protection Act 1975 and was administered by the Advisory, Conciliation, and Arbitration Service (ACAS). This procedure also ended after a brief and unhappy life, but for different reasons. The low point was reached in *Grunwick v ACAS* where the employer had refused to cooperate with either the trade union or ACAS in a disputed recognition case. The House of Lords considered that ACAS could not recommend recognition without a full investigation, even when the reason for the lack of such an investigation was obstruction by the employer motivated by bitter employer hostility to the unionization of the workforce.³⁵ In fact, a series of damaging judicial review cases had impeded the discretionary work of ACAS to such an extent that the legislation became very difficult to administer.³⁶

The current statutory procedure is set down in Schedule A1 TULRCA 1992 and has been in operation since 2000. In its most recent annual report, the CAC indicated that there had been only 51 applications for trade union recognition in 2016-17, a figure which has remained relatively steady in recent years.³⁷ The impact of Schedule A1 has therefore been rather

³⁴ See Bogg n.7 above, ch. 1.

³⁵ [1978] ICR 231.

³⁶ Discussed in Bogg and Novitz, n.7 above.

³⁷ See the Central Arbitration Committee (CAC) Annual Report 2016-17 available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629689/CAC_Annual_Report_2016-17.pdf.

marginal, both in respect of union recognition secured directly under the legislation and union recognition secured through “voluntary” means.³⁸

We think that there are several reasons for this pattern. One, which emerged in respect of the controversy over the abolition of the Agricultural Wages Board, is the requirement that there be a 21 worker threshold for the statutory system to apply.³⁹ There is also the point made powerfully by Anne Davies that part time workers only count as “half” under this system, so that the threshold may be even more difficult to meet. Further, the very threshold of “worker” is currently difficult to satisfy in the context of the “gig” economy, so that substitution clauses inserted unilaterally by the putative employer into couriers’ contracts were able to defeat a claim for statutory recognition.⁴⁰ Moreover, “the winner takes it all”, with there being no scope for members only bargaining orders or for an individual to insist on being represented by a trade union where the union fails to secure a majority. There is a problem of a simple “non-union default”,⁴¹ exacerbated by significant limitations on the “unfair practice” constraints set out in the legislation.

The domestic courts have sometimes used Article 11 of the ECHR to provide a purposive construction of certain elements of the statutory scheme. For example, in *Netjets Management Limited v Central Arbitration Committee & Anor* the High Court considered the appropriate interpretation of the legislation’s territorial jurisdiction by reference to Article 11. In this respect, Supperstone J. observed that: “The reality is that if the Union cannot bargain collectively with the Claimant in relation to their pay, hours and holidays in Great Britain they will not be able to exercise their Article 11 right.”⁴² In *Wandsworth London Borough*

³⁸ See Gregor Gall, “Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition” (2014) 43 ILJ 218.

³⁹ See text accompanying n.28 above. See further A.C.L. Davies, “‘Half a Person’: A Legal Perspective on Organizing and Representing Non-Standard Workers” in Bogg and Novitz (eds) n.3 above, at 122.

⁴⁰ *Independent Workers’ Union of Great Britain (IGWB) and RooFoods Limited TA/ Deliveroo*, Central Arbitration Committee 14 November 2017 (TUR1/985(2016)).

⁴¹ Cf. the proposals in Mark Harcourt, Gregor Gall, Rinu Vimal Kumar, Richard Croucher, “A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation” (2018) ILJ advance access, available at: <https://academic.oup.com/ilj/advance-article/doi/10.1093/indlaw/dwy005/5040332?searchresult=1>.

⁴² *Netjets Management Ltd v Central Arbitration Committee and another* [2012] EWHC 2685, para 42.

Council v Vining and Others, the exclusion of “parks officers” from the scope of the statutory redundancy consultation scheme was regarded as a violation of theirs and their union’s Article 11 rights. Such exclusions from statutory schemes required a justification, and no justification had been offered on the facts of the case.⁴³ This might have a wider significance for the appeal currently being brought on behalf of gig economy workers.

However, the Court of Appeal in *Pharmacists’ Defence Association Union v Boots Management Services Ltd* declined to issue a “declaration of incompatibility” in a situation where the employer had recognised a non-independent trade union which blocked the statutory application of a competing independent trade union.⁴⁴ The Court of Appeal took the view that it was sufficient that an individual worker could petition for a derecognition ballot under the legislation, and that the detailed implementation of the “right to recognition” was a matter for the legislature. Overall, the role of Article 11 in relation to the UK statutory scheme might be described as ‘mostly harmless’.⁴⁵ It has sometimes provided modest purposive support to the statutory scheme at the margins. More significantly, perhaps, Article 11 has not been used by the courts to frustrate the statutory scheme, in the manner of the English courts under the 1975 statutory recognition scheme in the UK.⁴⁶

As matters stand (in the midst of this complex statutory and rights-based matrix), the rate of British unionization and collective bargaining coverage is in decline. Union membership has fallen from a peak of 65% (approximately 13 million employees) in 1980 to 23.5% in 2016 (approximately 6.2 million employees). There has been a decrease of 8.9% even since 1995.⁴⁷ Membership is eroding in both the private and public sectors. In the private sector, membership declined in 2015-16 for the first time in 6 years and stands only at 13.4%, while in the public sector it is now 52.7%. In 2015-16 both declined in a way which has been

⁴³ *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092.

⁴⁴ *The Pharmacists’ Defence Association Union v Boots Management Services Ltd and Secretary of State for Business Innovation and Skills* [2017] EWCA Civ 66; discussed in Alan Bogg and Ruth Dukes, “Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists’ Defence Association Union v Boots Management Services Ltd*” (2017) 46 ILJ 543.

⁴⁵ As per Douglas Adams, *A Hitchhiker’s Guide to the Galaxy* (Pan Books, London, 1979).

⁴⁶ See text accompanying n.36 above.

⁴⁷ Mark Cully et al, *Britain at Work: As Depicted by the 1998 Workplace Employee Relations Survey 1999*. 235-42; and Department for Business, Energy and Industrial Strategy (DBEIS), *Trade Union Membership 2016: Statistical Bulletin*, 2017, 3.

described as “statistically significant”.⁴⁸ This can be contrasted with previous growth in public sector trade union membership from 1995 – 2005 and stability until 2010.⁴⁹ This correlates broadly to collective bargaining coverage, which stands in the public sector at 57.6%, while only 15.2% of employees in the private sector had their pay and conditions negotiated by a union. Over the past twenty years, the percentage for the public sector has dropped by 16.8% and in the private sector by 8%.⁵⁰ The result seems to be that rates of pay are lowering and terms and conditions worsening, especially in particularly vulnerable sectors of the economy, such as that concerned with adult social care.⁵¹ In other words, the United Kingdom is facing regulatory failure in various sectors of its labour market.

Unsurprisingly, the result in the British Labour Party has been to propose radical reform of collective bargaining mechanisms. The British Institute of Employment Rights (IER - a think tank for policymaking linking trade unions with academic specialists in labour law and industrial relations) in 2016 launched *A Manifesto for Labour Law*, which advocated a new Ministry of Labour and new “machinery for the development of sector wide standards”.⁵² The Manifesto proposed that “ultimately every worker and every employer of workers in this country should be covered by a collective agreement concluded at sectoral level”, a call which follows from previous IER policy proposals and publications.⁵³ Sectoral Employment Commissions set up by the Ministry of Labour would “promote collective bargaining and ... regulate minimum terms and conditions of employment within specific industrial sectors”.⁵⁴ These proposals have been welcomed by the current British Labour Party leadership, which in the most recent Labour election manifesto made a commitment to create a Ministry of

⁴⁸ DBEIS n.47 above, 3 and 6.

⁴⁹ DBEIS n.47 above at 12.

⁵⁰ <https://www.statista.com/statistics/287297/collective-agreement-coverage-unions-united-kingdom-uk-y-on-y-by-sector/>.

⁵¹ See Lydia Hayes, *8 Good Reasons Why Adult Social Care Needs Sectoral Collective Bargaining* (IER, Liverpool, 2017), available at: <http://www.ier.org.uk/publications/8-good-reasons-why-adult-social-care-needs-sectoral-collective-bargaining>.

⁵² K.D. Ewing, John Hendy and Carolyn Jones (eds), *A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers' Rights* (IER, Liverpool, 2016), ch 3, especially at 20. We should add that the authors of this article are also contributors to this publication.

⁵³ Keith Ewing and John Hendy, *Reconstruction After the Crisis: A Manifesto for Collective Bargaining* (IER, Liverpool, 2013); Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Inequality* (London/Liverpool: CLASS/IER, London/Liverpool, 2014) available at: http://classonline.org.uk/docs/2014_trade_unions_and_economic_inequality_-_Hayes__Novitz.pdf.

⁵⁴ See the Manifesto n.52 above at 20 - 21.

Labour and “review the rules on union recognition so that more workers have the security of a union”. Further, the British Labour Party would, in its “20 point plan”, “roll out sectoral collective bargaining – because the most effective way to maintain good rights at work is collectively through a union”.⁵⁵ At present, however, the UK has a Conservative Government held in place by a precarious coalition with the Democratic Unionist Party in Northern Ireland. There is accordingly no immediate prospect of implementation of these policy proposals and no way to know how they would fare under a human rights review by the domestic courts or the ECtHR.

New Zealand shifts from state control to individual agency and on to sectoral bargaining?

In terms of the New Zealand experience, the Industrial Conciliation and Arbitration (IC&A) Act from 1894 onwards offered a highly regulated system of collectively negotiated “awards” which operated in particular sectors. IC&A therefore operated in stark contrast to British “collective laissez faire”, although it does not look so very dissimilar to the proposals of the current British Labour Party.

Anderson and Nuttall have attributed the IC&A system more to New Zealand trade unions’ political as opposed to industrial strength.⁵⁶ This was a legislative solution which aided trade unions when the bitter 1890 Maritime Strike ended with victory for the employers. In the UK, trade unions were (at least at that time) stronger and could, without State support, engage in significant regulation of workers’ treatment in the workplace.

Initially, parties could include “union membership clauses” in awards or agreements, with a Labour Government introducing compulsory trade union membership in 1936 (with limited conscience clauses and an exception for the public service).⁵⁷ Awards covered all workers in a particular industry, with effectively monopoly unions engaged both in representing workers in the IC&A system and subsequently enforcing the awards in the workplace.⁵⁸ At this stage,

⁵⁵ *For the Many, Not the Few* (Labour Party, London, 2017) available at: <https://labour.org.uk/manifesto/>.

⁵⁶ Anderson and Nuttall n.3 above at 195.

⁵⁷ See discussion in Tonia Novitz, “New Zealand Industrial Relations and the International Labour Organisation: resolving Contradictions in Freedom of Association” (1996) 21 NZ Journal of Industrial Relations (NZJIR) 119 at 125.

⁵⁸ Anderson and Nuttall n.3 above at 197.

there was almost complete trade union membership among the workforce, but the extent to which unions effectively represented their members was questioned by some commentators.⁵⁹ A “New” Labour Government, pursuing “Rogernomics” and what has been described as a “neo-liberal” economic agenda abolished compulsory arbitration⁶⁰ and later introduced the Labour Relations Act 1987, which made provision for collective bargaining outside the traditional structure of awards and registered collective agreements, allowing for “enterprise” level bargaining at workplaces.⁶¹ Only registered trade unions with over a thousand members could claim the enhanced representation and negotiation rights within the national awards structure.⁶²

By 1991, a newly elected National Government had introduced the Employment Contracts Act, which entirely abolished the past system of union registration alongside any remnants of the IC&A system. Instead, workers and their employers could authorise “bargaining agents” (who could be any person or organisation) to conclude employment contracts on their behalf, whether individual or collective. Notably, even established trade unions would not necessarily constitute workers’ bargaining agents, regardless of historical patterns of representation. The number of workers covered by a collective agreement dropped swiftly (by approximately 45%).⁶³ While the Employment Relations Act 2000 was introduced to ameliorate that damage, the agency model for union representation remains much the same and collective bargaining coverage has never recovered.⁶⁴

The 2000 legislation introduced a duty to deal with “good faith”⁶⁵ and the sole right of trade unions to negotiate collective employment contracts for their members.⁶⁶ Further, while there is no obligation to enter into a collective agreement or agree on any matter for inclusion in a

⁵⁹ *Ibid.*, citing Martin Gross, “The Condition of New Zealand Trade Unions” [1961] NZ J of Public Administration 28; and Noel Woods, “Comments on the Industrial Conciliation and Arbitration Act 1894” (1994) 19 NZJIR 225.

⁶⁰ Anderson and Nuttall n.3 at 198 citing the Industrial Relations Amendment Act 1984.

⁶¹ Novitz n.57 at 127.

⁶² Labour Relations Act 1987, s. 6.

⁶³ Novitz n.57 at 129.

⁶⁴ Pam Nuttall, “Collective Bargaining and Good Faith Obligations in New Zealand” in Creighton and Forsyth n.7 above, at 292.

⁶⁵ Employment Relations Act 2000, s. 4 and s.32.

⁶⁶ Employment Relations Act 2000, s. 40.

collective agreement, an employer will not comply with their “good faith” obligations if they refuse to enter into a collective agreement “because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement”.⁶⁷ In such circumstances, the New Zealand Employment Relations Authority may impose all or part of a first contract.⁶⁸

A procedure introduced in 2004 looks less like an exercise of the individual right to trade union representation and more like a UK “democratic” mechanism. It applies where there is either “one union proposing to initiate bargaining with two or more employers for a single collective agreement”, or “two or more unions proposing to initiate bargaining with one or more employers for a single collective agreement”.⁶⁹ This has enabled an employer and union to conduct a joint ballot of non-unionised employees, prior to any collective agreement coming into force, to see if non-union members would be prepared to pay the “bargaining fee” to make the union their agent and be covered by the collectively negotiated terms. If there is majority support in the ballot, then all non-union members can come within the coverage clause of the collective agreement, unless an individual chooses on a personal basis not to pay the bargaining fee.⁷⁰ An employer cannot “undermine” the collective agreement by passing on identical terms to non-union members otherwise.

It should be observed that “collective employment agreements” are legally binding in a very different way to the UK, where the norm is for only those terms “incorporated” into individual employment contracts to be legally enforceable.⁷¹ Also, under the 2000 Employment Relations Act, anyone who joins a union automatically joins the corresponding collective agreement that covers his or her work.⁷²

However, the legislative changes since 1991 have not led to notably enhanced outcomes. New Zealand continues to have one of the lowest rates of collective bargaining coverage in

⁶⁷ Employment Relations Act 2000 (as amended), s. 33.

⁶⁸ Employment Relations Act 2000 (as amended), s. 50J, as discussed by Harcourt et al n. 41 above, at 24.

⁶⁹ Employment Relations Act 2000 (as amended), s.45 et seq.

⁷⁰ See Employment Relations Act 2000, s. 69P; discussed by Nuttall n. 64 above, at 304.

⁷¹ TULRCA 1992, s. 179; see also *Ford Motor Co v. AUEW* [1969] 2 QB 303 and on “aptness for incorporation” *Malone & Ors v British Airways plc* [2011] IRLR 32.

⁷² Employment Relations Act 2000, s. 18 and 56, as discussed by Harcourt et al n.41 above, at 23.

the OECD at under 20%, with links to lower wages and higher income inequality.⁷³ Like the United Kingdom, New Zealand has witnessed in the 2010 “Hobbit legislation” the systemic and arguably even more deliberate exclusion of certain persons from “worker” status and, thereby, collective bargaining rights.⁷⁴

However, changes are taking place. In April 2017, the then Prime Minister Bill English (with cross-party support) announced a \$2 billion pay equity settlement for care and support workers in New Zealand aged and disability residential care and community support services. A new pay scale was introduced in the sector which raised the minimum wage from \$15.75 per hour to \$19 per hour – a 21% rise.⁷⁵ This addresses concerns in a vulnerable employment sector noticed also in the UK.⁷⁶ The new Coalition Government in New Zealand (led by Jacinda Ardern) has indicated that this Care and Support Workers Settlement should be regarded as the beginning of a roll out of Fair Pay Agreements on a sectoral level.⁷⁷ A Fair Work Agreements team representing various aspects of the political spectrum and diverse industrial and expert actors has been established to carry the plan forward.⁷⁸ In response, the Opposition, the National Party (along with BusinessNZ) say that when back in office they will abolish Fair Pay Agreements, since they will take NZ back to sectoral strikes,⁷⁹ (although of course what we know of the awards system is that they managed to suppress strikes for a

⁷³ Submission of the NZCTU on the Employment Relations Amendment Bill 2018, 30 March 2018, at 13, available at: <https://www.union.org.nz/wp-content/uploads/2018/04/NZCTU-Employment-Relations-Amendment-Bill-2018-Final.pdf>. See also the OECD statistics which says that the number of employees in New Zealand with the right to bargain in 2016 lay at 16%: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>.

⁷⁴ See the Employment Relations (Film Production Work) Amendment Act 2010 discussed in Bernard Walker and Rupert Tipples, “The Hobbit Affair: A New Frontier For Unions?” (2013) *Adelaide Law Review* 65. See also Pam Nuttall, “‘... Where the Shadows Lie’: Confusion, Misunderstanding, and Misinformation about Workplace Status’ (2011) 36 *New Zealand Journal of Employment Relations* (NZJER) 73; and Margaret Wilson, “Constitutional Implications of ‘The Hobbit’ Legislation” (2011) 36 *NZJER* 91.

⁷⁵ See for the text of the agreement: <http://www.etu.nz/resources/care-and-support-workers-pay-equity-settlement-agreement/> signed 1 July 2017; and for media comment: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11840364.

⁷⁶ See Hayes n.51 above.

⁷⁷ See Doug Martin, “Fair Pay Agreements—Issues and challenges for a new wave of collective bargaining” available at: <https://medium.com/from-the-exosphere/fair-pay-agreements-issues-and-challenges-for-a-new-wave-of-collective-bargaining-f5fe760a051e>.

⁷⁸ <https://www.beehive.govt.nz/release/government%E2%80%99s-fair-pay-agreement-work-begin>.

⁷⁹ <https://www.newshub.co.nz/home/politics/2018/06/national-promises-to-scrap-government-s-fair-pay-agreements-working-group.html>.

considerable period). Indeed, it is already contemplated that strikes will not be permitted in respect of such agreements.⁸⁰ Arguably, this new policy stance takes New Zealand beyond a human rights or “representational” collective bargaining framework as issues of “regulatory” efficacy become more relevant.

Further, we note that, at the time of writing, amendment of the “Hobbit law” is anticipated, such that the right to engage in collective negotiations will be restored. Again, a working group (including a variety of social actors including BusinessNZ and the Council of Trade Unions) has been formed to recommend changes that balance film industry and workers’ protections.⁸¹ This suggests a shift to enabling broader collective bargaining coverage for non-standard work, which does have a flavour of the human right to be represented by a trade union.

4. Final reflections on the “virtuous circle” between representational and regulatory bargaining models and the nature of “constitutionalisation”

We wish to conclude by stressing that there is no necessity to choose between “representational” or “regulatory” bargaining models. Indeed, we believe that there are significant advantages in a democratic system of collective bargaining that provides simultaneous support to enterprise and sectoral bargaining. In this respect, we agree with Ewing and Hendy that “the extension of collective bargaining is not simply about the expansion of horizontal measures for sectoral standard setting, but also for simultaneously deepening vertical enterprise-based trade union activity, vertical in the sense that the trade union role should be embedded from the cloakroom to the boardroom. The two (the horizontal and the vertical) should be highly integrated.”⁸² Rather, we think that this multi-level approach can create a “virtuous circle” of solidaristic practices. Strong union organisation in the enterprise provides legitimacy and support to the maintenance of sectoral bargaining. Strong sectoral bargaining reduces the scope for employers to challenge the legitimacy of enterprise-based unionism, and it reduces the economic incentives for union exclusion and avoidance. It might therefore be possible to marry regulatory sectoral

⁸⁰ https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12064964.

⁸¹ <https://www.newsroom.co.nz/2018/01/29/78965/the-hobbit-law-there-and-back-again>.

⁸² Ewing and Hendy n.6 above, at 42.

bargaining with majoritarian recognition in enterprise bargaining, as well as agency options for multi-union workplaces where otherwise recognition would be unavailable.

The achievement of this “virtuous circle” requires patient work to ensure that these bargaining arrangements are effectively aligned and efficiently coordinated. Still, the matter of effective coordination is not solely a matter of regulatory design. We should acknowledge that there are two potential sources of normative friction between “representational” and “regulatory” bargaining in any integrated system. The first lies in the role and function of democratic arguments; and the second lies in the facilitative or obstructive role of a constitutionalised human rights frame.

From the perspective of “democracy”, in “representational” bargaining the principal normative focus is on ensuring that the bargaining representative has democratic legitimacy. Discussions are directed at the nature of the consent or balloting mechanisms, the specification of support thresholds, the circumstances in which ballots might be dispensed with, alternative methods for gauging majority support, and so forth.

For “regulatory” bargaining, by contrast, legitimacy requires a wider consideration of the performance outcomes of governance arrangements. This has been described as “performance legitimacy” in Neil Walker’s rich account of governance legitimacy. “Performance legitimacy” is focused upon the ability of governance processes to deliver good policy outcomes.⁸³ This would require a consideration the objective qualities and characteristics of the representative organization and its ability to perform an effective role in the formulation and implementation of policy goals. Veneziani for example identifies “the scope of the union’s professional constituency, its affiliation to a national union and its functional and structural suitability”.⁸⁴ This assessment of the organization’s attributes from the perspective of “performance legitimacy” encompasses a multiplicity of factors that might

⁸³ Neil Walker, “The White Paper in Constitutional Context” in Christian Joerges, Yves Meny and Joseph Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* published as Jean Monnet Working Paper No 6/01, RSC, 2001; discussed in Tonia Novitz and Phil Syrpis, “Assessing Legitimate Structures for the Making of Transnational Labour Law: The durability of corporatism”(2006) 35 ILJ 367 at 369-370; and Alan Bogg, “The Death of Statutory Union Recognition in the UK” (2012) 54(3) *Australian Journal of Industrial Relations* 409 at 417-418.

⁸⁴ Veneziani (1999) n.8 above, at 129.

include: financial resources; research capacities to gather and interpret relevant economic data; integration with national and transnational trade union confederations; organizational independence from employers; a history of bargaining in a particular sector, indicating suitability and special expertise; and effective internal participatory structures to facilitate the democratic input of members. All these factors provide an indication of the trade union's actual bargaining capabilities, namely the capacity to make a genuine difference which adds value to workers' agreed terms and conditions.

Secondly, we may wish to reflect on the role of constitutionalised rights in facilitating or impeding bargaining structures. Constitutional jurisprudence in Canada and under the European Convention on Human Rights (ECHR) has undergone a transformation following the constitutional recognition of the right to bargain collectively and the right to strike under the Canadian Charter and the ECHR.⁸⁵ These rights are now treated as protected under general freedom of association guarantees in the constitutional document. On the face of it, a jurisdiction like New Zealand might appear to be at a distinct disadvantage in missing out on this constitutional wave. However, we have seen that in the United Kingdom as elsewhere, constitutional rights have operated sometimes as impediments to the wider ambit of trade union organisation, as indeed they have done in other judicial contexts. This is no more than a recognition that constitutionalised labour rights, protected through constitutional courts, sometimes bring losses as well as gains for working people. We might also wish to remember that "constitutionalisation", just like "democracy", can be understood in a multiplicity of ways.

Ruth Dukes has described the "constitutional function" of labour law as harnessing law "to institute, or recognize, a system of workers' councils and bi-partite industrial councils, and to confirm the continued existence of the trade unions and employers' associations".⁸⁶ In so doing, she conceives of constitutionalisation in terms of institutions, constitutional structures for worker participation, and democratic outcomes. In this respect, she eschews a narrow

⁸⁵ See Fudge n.12 above.

⁸⁶ Ruth Dukes, "Hugo Sinzheimer and the Constitutional Function of Labour Law" in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP, Oxford, 2011), 62. See also Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP, Oxford, 2014).

preoccupation with juridical form focused on fundamental rights guarantees in a written constitution.

If New Zealand proposals to institute sectoral “Fair Pay Agreements” are successful, the New Zealand system may yet represent an exemplar of a constitutionalised and democratic system of labour law that produces equitable social and economic outcomes. Paradoxically, perhaps, this will have been achieved in a system lacking constitutionalised labour rights in the sense of a legally enshrined human rights paradigm (even if this is manifested in its “agency model”). However, bearing in mind Dukes’ fuller sense of “constitutionalisation” in the sense of institutional social justice, this may indeed be achieved. This triumph of democratic substance over democratic form would be a fitting testament to the very same themes that characterize Gordon Anderson’s reflections on collective bargaining laws in New Zealand and beyond.